

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Federal-State Joint Board on)	
Universal Service)	CC Docket No. 96-45
)	
Petition by N.E. Colorado Cellular, Inc.)	DA 05-469
Pursuant to 47 C.F.R. Section)	
54.207(c), for Commission)	
Agreement in Redefining the Service)	
Areas of Rural Telephone Companies)	
In the State of Colorado)	

REPLY COMMENTS OF N.E. COLORADO CELLULAR, INC.

N.E. Colorado Cellular, Inc. d/b/a Viaero Wireless (“NECC”) hereby replies to comments filed by the Colorado Telecommunications Association (“CTA”) regarding NECC’s Petition for Commission concurrence with the proposal by the Colorado Public Utilities Commission (“COPUC”) to redefine rural local exchange carrier (“ILEC”) service areas (“Petition”). As set forth below, the proposed redefinition meets the FCC’s standards for redefinition and is indispensable to the promotion of efficient competition in rural Colorado, and CTA’s arguments to the contrary are unavailing.

I. DISCUSSION

A. CTA’s Policy Arguments Have Been Decisively Rejected by COPUC and the FCC.

As NECC explained in its Petition, the proposed redefinition is warranted under the Act and the Commission’s competitively neutral universal service policies, and it constitutes

precisely the same relief granted to similarly situated carriers by the Commission and several states.¹ Moreover, the requested redefinition satisfies the analysis provided by the Federal-State Joint Board on Universal Service. NECC's proposal also satisfies the FCC's analysis set forth in *Virginia Cellular*² and reaffirmed in the *2005 Report and Order* released last week,³ in that NECC is not proposing to serve primarily densely-populated areas or portions of rural ILEC wire centers.

Rather than focus on the merits of the instant Petition, CTA attempts to reverse both pre- and post-*Virginia Cellular* policies by arguing that redefining service areas "is not necessary", "upends the concept of universal service", and "violates the principle of competitive neutrality."⁴ Time and time again, however, both COPUC and the FCC have affirmed that redefinition is fully warranted to promote universal service and remove barriers to competition in rural areas.⁵ Most recently, in the *2005 Report and Order*, the FCC declined to "adopt rules prohibiting redefinition below the study area level", noting that such a proposal "ignores the provision in section 214(e)(5) that allows redefinition to occur".⁶ In the same order, the FCC granted nine pending pre-*Virginia Cellular* petitions for redefinition that had been held up during the FCC's conduct

¹ See Petition at pp. 6-9.

² *Virginia Cellular, LLC*, 19 FCC Rcd 1563, 1578-79 (2004) ("*Virginia Cellular*") ("Although there are other factors that define high-cost areas, a low population density typically indicates a high-cost area. Our analysis of population density reveals that Virginia Cellular is serving not only the lower cost, higher density wire centers in the study areas of MGW and Shenandoah.") (footnote omitted).

³ *Federal-State Joint Board on Universal Service, Report and Order*, FCC 05-46 (rel. March 17, 2005) ("*2005 Report and Order*") at ¶ 50 ("Because a low population density typically indicates a high-cost area, analyzing the disparities in densities can reveal when an ETC would serve only the lower cost wire centers to the exclusion of other less profitable areas.")

⁴ CTA Comments at p. 2.

⁵ See Petition at pp. 6-8.

⁶ *2005 Report and Order*, *supra*, at ¶ 75.

of a proceeding to change and clarify its policies on competitive ETCs.⁷ While the FCC noted that future petitions for redefinition would be subjected to rigorous scrutiny under the policies and standards applied since *Virginia Cellular*, the application of those standards have resulted in several grants of petitions for redefinition filed since *Virginia Cellular*.⁸ The FCC has made clear its intent to grant concurrence with redefinition proposals that meet specified criteria,⁹ and CTA offers no persuasive reason for the FCC to reverse course.

B. CTA Concedes That the Petition Satisfies the FCC's Requirements.

Despite its failure to make a case at the state level, CTA primarily focuses its arguments before the FCC on vaguely stated “cream-skimming” concerns. Yet CTA effectively concedes that NECC’s population density analysis satisfies current FCC policies and rules. CTA does not suggest that NECC is primarily serving densely populated, low-cost areas, nor does it suggest NECC proposes to serve portions of wire centers. Faced with a Petition that satisfies current FCC rules and standards to the letter, CTA instead asks the Commission to reverse over a year’s worth of decisions following *Virginia Cellular* and “consider factors other than population density.”¹⁰ Yet the FCC reaffirmed that precedent last week after a lengthy rulemaking process during which CTA had ample opportunity to introduce any such factors for consideration. What’s more,

⁷ See *id.* at ¶¶ 78-79.

⁸ See, e.g., NPI-Omnipoint Wireless, LLC, Case No. U-13714 (Mich. PSC, Aug. 26, 2003) (FCC concurrence granted Feb. 1, 2005) (“NPI-Omnipoint Michigan Order”); Highland Cellular, Inc., Case No. 02-1453-T-PC, Recommended Decision (W.V. PSC Sept. 15, 2003) (FCC concurrence granted Jan. 24, 2005) (“Highland W.V. Order”); Cellular Mobile Systems of St. Cloud, Docket No. PT6201/M-03-1618 (Minn. PUC, May 16, 2004) (FCC concurrence granted Oct. 7, 2004); RCC Minnesota, Inc., Docket No. 1083 (Oregon PUC, June 24, 2004) (FCC concurrence granted Oct. 11, 2004); United States Cellular Corp., Docket 1084 (Oregon PUC, June 24, 2004) (FCC concurrence granted Oct. 11, 2004).

⁹ CTA’s proposal to require competitive ETCs to “cover” remaining portions of study areas via resale (see CTA Comments at pp. 2-3) would be tantamount to prohibiting redefinition, which the FCC has soundly rejected as set forth above.

¹⁰ CTA Comments at p. 3.

CTA never even mentions what those other factors might be. CTA fails to identify an applicable standard other than the population density analysis under *Virginia Cellular* and its progeny, and NECC's strong showing under that standard is essentially unchallenged. CTA's concerns are with the FCC's rules in general, and this is not a rulemaking. Accordingly, its arguments in opposition should be rejected.

C. The Commission Should Ignore CTA's Suggestion of an "Implied Rationale" Behind COPUC's Instruction That NECC File the Petition.

CTA attempts to distract the Commission by suggesting the existence of some hidden meaning behind COPUC's decision to instruct NECC to Petition the FCC for concurrence. Specifically, CTA states that, by instructing NECC to Petition the FCC for concurrence instead of filing the petition on its own, COPUC "implicitly acknowledges" that the "danger of cream-skimming is quite real" and that disaggregation of support "is not necessarily an effective remedy for incumbent LECs and their customers."¹¹

COPUC in fact stated the exact opposite of what CTA suggests, as evidenced from the closing paragraph of its decision on exceptions in which it emphasized CTA's complete failure to make any persuasive cream-skimming argument:

Granting NECC's Application to redefine the carriers' service areas will promote competition and its attendant benefits. CTA, on behalf of the rural carriers, has not expressed any concern with cream-skimming that persuades us to ignore those potential benefits. We observe that CTA failed to raise any concern with cream-skimming in its Exceptions from the Recommended Decision. Even in its Supplemental Brief, after the Commission directly raised the question of whether the rural carriers' universal service support should be disaggregated in some manner other than Path 1, CTA still did not express an unequivocal desire to target the rural carriers' support below the study-area level. For all these reasons, we conclude that redefining the rural carriers' service areas as requested by NECC meets the Joint Board requirement to minimize cream-skimming by potential competitors.¹²

¹¹ CTA Comments at p. 7.

¹² See *Decision on Exceptions* at p. 21 (footnote omitted).

CTA's suggestion of an "implied rationale" that flies directly in the face of COPUC's actual language deserves no serious consideration.

D. CTA's Arguments Regarding Disaggregation Are Irrelevant and Without Merit.

CTA complains that disaggregation is inadequate as a solution for cream-skimming and represents a "heavy administrative burden on ILECs".¹³ This is a red herring. Because NECC is not primarily serving the densely populated, lower-cost portions of the ILECs' study areas, those ILECs do not need disaggregation to protect themselves. As the ALJ made clear in the *2003 Recommended Decision*, "the outcome of this proceeding will *not* change the Path One election made by the affected rural ILECs and, in and of itself, will *not* require those ILECs to make new disaggregation elections."¹⁴

Finally, CTA's claim that "NECC has a history of increasing the costs associated with disaggregation"¹⁵ – merely based on NECC's participation in the proceeding before COPUC to consider the Path Three disaggregation filing of Wiggins Telephone Association ("WTA") – is disingenuous. In that proceeding, NECC challenged WTA's proposed allocation of local switching support ("LSS"), arguing that it both lacked a sound factual basis¹⁶ and had the anticompetitive effect of assigning the lowest levels of support to wire centers in which WTA knew NECC was seeking ETC status.

¹³ See *id.* at pp. 5-6.

¹⁴ See *2003 Recommended Decision* at p. 19 (emphasis in original).

¹⁵ CTA Comments at p. 6.

¹⁶ For example, the level of LSS allocated to the wire center in which the host switch was located was greatly exceeded by the levels allocated to wire centers in which remote switching units were located, even though "[a]ll switching is done through the main switch in Wiggins." In the Matter of the Application of Wiggins Telephone Association for Approval of its Disaggregation Plan, Recommended Decision of Administrative Law Judge Ken F Kirkpatrick Accepting Stipulated Disaggregation Plan, Docket No. 02A-276T at pp. 3-5 (mailed Dec. 13, 2002)

NECC did nothing but pursue its rights under the framework allowed under Colorado statutes and regulations, and its arguments were solidly backed up with expert testimony. If CTA truly believed NECC was raising its objection solely for the purpose of increasing costs, it could have sought recourse under the Code of Colorado Regulations, which provides for the possibility of sanctions in the event a pleading is submitted for an improper purpose.¹⁷ Having failed to make this argument in the proceeding before COPUC, it is inappropriate for CTA now to use it in an attempt to gain advantage in another proceeding before another agency that has no jurisdiction over the misconduct CTA alleges.

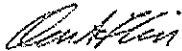
[continued on next page]

¹⁷ 4 CCR 723-1-11 (Standards of Conduct for Parties Appearing Before the Commission).

II. CONCLUSION

The service area redefinition proposed by NECC is substantially the same as those granted by the FCC and state commissions throughout the country, and NECC's strong showing warrants a prompt concurrence. COPUC has recognized that the benefits of having the company designated throughout its proposed ETC service area are substantial and those benefits will inure to rural consumers who desire NECC's service, particularly those consumers who are eligible for Lifeline and Link-Up benefits and currently have no choice of service provider. Because NECC's proposed service area redefinition will remove barriers to competition, properly considers the recommendations of the Joint Board, and will not harm any party, the FCC should grant its concurrence and allow the proposal to become effective without further action.

Respectfully submitted,



David A. LaFuria
Steven M. Chernoff
Lukas Nace Gutierrez & Sachs, Chartered
1650 Tysons Boulevard, Suite 1500
McLean, VA 22102

/s/ _____
Craig Joyce
Fairfield and Woods, P.C.
1700 Lincoln Street, Suite 2400
Denver, CO 80203

Attorneys for N.E. Colorado Cellular, Inc.

March 24, 2005

CERTIFICATE OF SERVICE

I, Donna L. Brown, hereby certify that on this 24th day of March, 2005, copies of the foregoing **REPLY COMMENTS OF N.E. COLORADO CELLULAR, INC.**, was placed in the United States mail, via first class, postage prepaid to:

Kevin Felty, Local Manager
Sunflower Telephone Company, Inc.
P.O. Box 236
Tribune, KS 67879

Eastern Slope Rural Telephone Assn.
403 Third Avenue
P.O. Box 397
Hugo, CO 80821-0397


Barry L. Hjort*
Executive Vice-President
Colorado Telecommunications Association
P.O. Box 300
Littleton, CO 80160

Pamela Fischhaber
Public Utilities Commission
1580 Logan Street, OL2
Denver, CO 80203

Anthony Marquez, Esq.
Paul Gomez, Esq.
Assistant Attorneys General
State Services Section
Office of the Attorney General
1525 Sherman Street, 5th Floor
Denver, CO 80203

Mark Seifert, Assistant Division Chief*
Telecommunications Access Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W., Room 5-C404
Washington, D.C. 20554

Thomas Buckley, Attorney-Advisor*
Telecommunications Access Policy Division
Federal Communications Commission
445 12th Street, S.W., Room 5-B552
Washington, D.C. 20554



Donna Linthicum-Brown

*Via e-mail